

## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Legislative & Regulatory Initiatives

Date: January 4, 2007

I am providing my analysis of nine (9) initiatives in anticipation of the January 11 meeting. Given time constraints, my commentary should be considered preliminary and non-exhaustive.

### 1. DOE Final Teacher of Students with Visual Impairments Reg. [10 DE Reg. 1147 (1/1/07)]

The SCPD and GACEC commented on the proposed version of these regulations in October, 2006. A copy of the GACEC's October 18 letter is attached for facilitated reference. Final standards have now been adopted incorporating revisions recommended by the Councils.

First, the Councils noted that the proposed standards made Braille instruction optional, contrary to Title 14 Del.C. §206(d). In response, the final regulations were amended to require applicants for a standard certificate to have training in both Braille and the "Nemeth Code". Consistent with the attached materials, the Nemeth Code is a format/symbol system used to communicate math, chemistry, and science information which is different from standard literary braille.

Second, the Councils recommended adoption of "people-first" language (e.g. referring to "teacher of students with visual impairments" rather than "teacher of the visually impaired"). The title of the regulations and Sections 1.0 and 3.0 were amended to reflect "people-first" language.

I recommend that the Councils issue a "thank-you" letter for effecting amendments consistent with Council commentary. The Councils should also note a minor oversight in Section 3.0. Instead of referring to Title 14 Del.C. §206(d), Section 3.0 refers to "Del.C. §206(d)". The citation is therefore incomplete.

### 2. DOE Final Teacher of Students Who Are Deaf/Hard of Hearing Reg. [10 DE Reg. 1144 (1/1/07)]

The SCPD and GACEC commented on the proposed version of these regulations in November, 2006. Final regulations have now been adopted with two changes prompted by the Councils.

First, the Councils recommended adoption of “people-first” language, i.e. referring to “teacher of students who are Deaf or hard of hearing”. The DOE amended the title and Section 3.0 to conform to this recommendation verbatim.

Second, the Councils noted some redundancy in the regulations. In response, Section 3.1.2 was deleted.

The GACEC included two additional comments, i.e. soliciting information on whether the regulation applied to substitute teachers and soliciting deletion of references to morality. The DOE did not respond to these comments. Parenthetically, the regulation would ostensibly not apply to substitute teachers. See Title 14 Del.C. §1202(6).

I recommend no further action.

### 3. DOE Final Shared Planning & Improvement Grant Reg. [10 DE Reg. 1140 (1/1/07)]

The SCPD and GACEC commented on the proposed version of these regulations in November, 2006. A copy of the GACEC’s November 30 letter is attached for facilitated reference. Final standards have now been adopted.

First, the Councils recommended that grant applications include the “results” of efforts to communicate with constituent groups. No amendment resulted.

Second, the Councils recommended that a minimum time period for posting the “report and recommendations” be included in the standards, as well as a requirement for posting on the district’s website. No amendment resulted.

Third, the Councils noted that the Delaware Code contains a deadline of May 1, 2000 for decision-making grants, suggesting that some of the regulations could be moot. No amendment resulted and no explanation was provided.

Fourth, the Councils noted that all of the DOE regulations published in the Register omitted required information (e.g. method and timetable for submission of comments on proposed regulations). The Department agreed to prospectively include “the cut off date for comments as well as the name and address of the person that should receive the comments” as part of the regulatory synopsis.

Since the regulations are final, no further action is required. However, the GACEC may wish to solicit either the DOE or the Budget Office to assess whether the May 1, 2000 deadline in Title 14 Del.C. 807(d) makes “shared decision-making” grants moot. The DOE never responded to this observation.

The Councils may also wish to affirmatively request that the DOE assess its compliance with the APA, Title 29 Del.C. §10118(a). This statute requires the DOE to provide “a brief summary of the ...information submitted” and “findings of fact” on the information submitted. As part of a deliberative process, the decision to adopt or revise the regulations must then be based on the findings. In this case, the Councils’ comments are not summarized. The only reference is that the Councils recommended “some changes to add clarity to the regulation”. This is not a meaningful summary compliant with the APA. Likewise, there is no summary of findings explicating why the DOE rejected the Councils’ recommendations. The APA does not require an “epistle” but it does contemplate inclusion of some rationale for acceptance or rejection of comments. A copy of the request should be shared with the Register of Regulations.

#### 4. DOE Prop. Cert. Of Early Childhood Special Ed Teacher Regulation [10 DE Reg. 1114 (1/1/07)]

The Department proposes to repeal a regulation establishing a certification for an early childhood teacher.

I have the following observations.

First, the DOE requires comments to be submitted by January 27, 2006. This is less than 30 days from publication and does not conform to Title 29 Del.C. §10118(a).

Second, the rationale for the repeal is that it has been replaced by 14 DE Admin Code §1570. I attach a copy of the latter regulation which covers certification for teachers of students from birth to grade 2. The repealed regulation covered teachers of students ages 3 to 6 years. The new regulation therefore encompasses a greater age range than the repealed regulation. The new regulation effectively makes the repealed regulation superfluous and ostensibly justifies repeal. However, this change may create some “tension” between DHSS and DOE jurisdiction to issue regulations:

A. On the one hand, DHSS is authorized to issue regulations implementing the IDEA-C program (covering students from birth through 36 months after review and comment by the Interagency Coordinating Council. See Title 16 Del.C. §218. Indeed, Title 16 Del.C. §212e contemplates DHSS development of regulations covering “qualified personnel”.

B. On the other hand, DOE is authorized to issue regulations implementing IDEA-B which covers the same age range (birth-2) for children with hearing impairment, visual impairment, deaf-blindness, or autism. See Title 14 Del.C. §§1703(k)(l)(m) and AMSES §4.1.1. Moreover, Title 14 Del.C. §3110(a) authorizes the DOE to issue regulations covering both Title 14 and “other titles” (e.g. Title 16). However, its certification regulations only cover teachers within public and charter schools. See Title 14 Del.C. §1202(6).

The interplay of these overlapping statutes raises some interesting issues. For example, does 14 DE Admin Code §1570 define the qualifications of a teacher providing services under Title 16 Ch. 2 if performed in a district or charter school sponsored setting? The DOE may wish to clarify the scope of application of its regulations in the context of Part C students.

#### 5. DOE Proposed Extracurricular Activities Regulation [10 DE Reg. 1112 (1/1/07)]

The Department proposes to adopt a minor revision to its extracurricular activities regulations. The only change is to clarify that charter schools must establish academic eligibility standards for participation in extracurricular activities. The only exception is interscholastic athletics which are subject to State standards.

The regulation is relatively benign. The Councils may wish to consider endorsement.

#### 6. DOE Proposed DSTP Regulation [10 DE Reg. 1103 (1/1/07)]

The Department proposes to adopt amendments to the DSTP to conform to changes in the Delaware Code. Consistent with the attached statutes (Title 14 Del.C. §§151 and 152), the Code contains two (2) sets of standards for student assessment and diplomas, i.e. one set applicable through January 1, 2008 and one set applicable after January 1, 2008. Regulatory Section 6.0 has therefore been modified to address the multiple standards.

I have the following observations.

First, there is a “typo” in Section 6.1.1 (“student’sg rade”).

Second, Section 6.5.2.2 would benefit from a clarifying sentence. It ostensibly contains a long list of 28 “other academic indicators” which can be substituted for DSTP scores. However, there is no introductory sentence describing the significance of the list. In contrast, Section 6.4.1.1 contains the following introduction to the list applicable to 2006-2007: “The Other Academic Indicators shall be:”

Third, the list of “other academic indicators” effective in 2008 (Section 6.5.2.2) is much longer than that applicable to pre-2008 graduates (Section 6.4.1.1). The applicable statute [Title 14 Del.C. §152(c)] authorizes the Department to adopt “other assessments approved at the state level in the content area”. The Department may wish to consider including some or all of 28 options in Section 6.5.2.2 in Section 6.4.1.1 since these options have obviously been validated.

Fourth, Section 6.5.3 permits some flexibility for a student who “has enrolled from another state or nonpublic school in Delaware during the year in which the student is scheduled to graduate.” For such students, an academic review team will review other academic indicators of performance. The term “during the year” could be construed as the calendar year. Thus, this provision would not apply to a student transferring in December with a Spring graduation date. It would be preferable to substitute “the school year” for “the year” to clarify that this regulation applies to students transferring in their senior year.

The Council may wish to share the above observations with the DOE and SBE.

#### 7. DMMA Prop. LTC Transfer of Assets Regulation [10 DE Reg. 1117 (1/1/07)]

The Division of Medicaid & Medical Assistance proposes to adopt some discrete changes to its transfer of asset standards. The amendments are designed to achieve conformity with the attached Section 6016(a)(b) of the Deficit Reduction Act of 2005. Background is provided in both the “Summary of Proposals” section of the regulations and the attached analysis of DRA Section 6016(a)(b) from the National Health Law Program.

First, states are no longer allowed to “round down” or disregard fractional periods of ineligibility. The NHeLP analysis provides the following example of the effect of the DRA in this context:

For example, if an individual makes an \$11,000 transfer for less than fair market value during the look back period in a state with a \$4,000 average monthly cost of nursing facility care, the resulting quotient is 2.75. Under the old rule, some states simply “rounded down” the penalty to two months, disregarding the remaining .75 (roughly three weeks) of the quotient. However, states must now impose the fractional period of ineligibility.

Second, for ease of administration, states may combine multiple fractional transfers and treat them as a single transfer. The NheLP analysis provides the following illustration:

Assume an individual in a state whose average monthly cost of nursing home care is \$4,000 makes a \$3,000 transfer in each of four consecutive months during the look-back period. Without combining the transfers, the state would have to impose four different penalty periods of .75 months ( $\$3,000 \div \$4,000 = .75$ ). By combining them, the state may simply impose a penalty of three months ( $\$3,000 \times 4 = \$12,000$ ;  $\$12,000 \div \$4,000 = 3$ ).

I did not identify any non-conformity between the proposed DMMA regulations and the DRA. The Councils may wish to either take no action or indicate there is no objection to adoption of the proposed regulation based on the above analysis.

#### 8. DMMA Final Institutionalized Spouse Reg. [10 DE Reg. 701 (10/1/06)] Update

In April, DMMA adopted regulations adding illustrations to institutionalized spouse standards. Although comments were not solicited, the SCPD objected to characterizing any spouse receiving HCBS as an “institutionalized spouse” which would remove spousal impoverishment protections. When DMMA declined to adopt any amendments, the SCPD solicited review by CMS. CMS then influenced DMMA to agree to delete the illustrations. See attached August 17, 2006 letter. DMMA then issued new regulations omitting the illustrations. However, the regulatory text still eliminated spousal impoverishment protections if a community spouse were receiving HCBS. Once again, the SCPD solicited CMS review. CMS has now issued the attached December 21, 2006 letter confirming its agreement with the Council’s interpretation. DMMA has been advised to change the regulation accordingly. It should appear in a future issue of the Register of Regulations.

#### 9. NCC In-law Suite Ordinance Update

Based on the attached August 19, 2006 News Journal article, the SCPD issued the attached September 8, 2006 letter endorsing the concept of an ordinance authorizing accessory units. The attached December 24, 2006 News Journal article mentions AARP and SCPD support and anticipates introduction of an ordinance on January 12.

I recommend that the Council solicit a copy of the proposed ordinance. Assuming it is acceptable, the Council could then submit an updated letter of endorsement and encourage other public and private organizations to support the legislation. According to the article, some civic groups may oppose the ordinance.

## Attachments

A:107bils.par

F:pub/bjh/legis/p&l/101bils